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No. 73-710

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In the Supreme Court of the United States

OCTOBER TERM, 1973

EUGENE L. SMALDONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 484 F. 2d 311.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 1973. A timely petition for rehearing was denied August 31, 1973 (Pet. App. 19a). On September 24, 1973, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including October 30, 1973, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial judge erred in excluding a question by defense counsel on cross-examination which, in the circumstances of this case, could reasonably

have been understood by the witness as implying the threat of retaliation.

2. Whether notes taken by a United States Attorney at an interview with a prosecution witness during preparation for trial constitute a "statement" as defined by 18 U.S.C. 3500(e).

3. Whether the district court appropriately instructed the jury with respect to the burden of proof.

4. Whether the district court properly denied petitioner's requests for discovery of detailed laboratory findings and memoranda of chemical tests.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULE INVOLVED

The Sixth Amendment to the Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *.

The Jencks Act, as amended, 18 U.S.C. 3500, provides in pertinent part:

> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. * * *
>
> * * * * *
>
> (e) The term "statement" * * * means—
>
> (1) a written statement made by said witness

> and signed or otherwise adopted or approved by him;
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; * * *.

Rule 16(a) of the Federal Rules of Criminal Procedure provides in pertinent part:

> Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant * * * results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the government * * *.

STATEMENT

Petitioner and Larry Merkowitz arranged for Craig Mundt, Ronald Greenspan, and Ronald Nocenti to purchase cocaine in Peru and deliver it to them in the United States (Tr. 125-126, 127-130, 132, 135-136).[1] With the assistance of Nocenti, who was a paid government informer, federal agents arrested both petitioner and Merkowitz as they took delivery of the cocaine (Tr. 140-142, 271, 279-283, 535).[2] Merkowitz pled guilty to one count of conspiracy to import cocaine, and he testified as a prosecution witness at petitioner's trial.

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[1] "Tr." refers to the transcript of trial proceedings (which begins with Volume II of the reporter's transcript).

[2] Mundt and Greenspan were arrested by Peruvian police in Peru (Pet. 5).

Petitioner was tried before a jury in the United States District Court for the District of Colorado and convicted on one count of conspiracy to import cocaine, in violation of 21 U.S.C. 963.[3] He was sentenced to ten years' imprisonment and fined $10,000. The court of appeals affirmed (Pet. App. 1a-18a).

ARGUMENT

1. During the cross-examination of Nocenti at trial, defense counsel asked him for his present address. The trial judge had previously been informed that Nocenti had been relocated for his own protection, and defense counsel similarly had been notified that "substantial reason to fear for [Nocenti's] safety has been shown and he has requested that his present whereabouts not be divulged" (Pet. App. 11a).[4] The only reason given by defense counsel at trial for wanting Nocenti's address was "[t]o place the witness in the context of his environment" (Pet. 7). The trial judge sustained the government's objection to defense counsel's question.

Petitioner contends (Pet. 14-20) that the trial court's ruling conflicts with this Court's decisions in *Alford* v. *United States*, 282 U.S. 687, and *Smith*

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[3] Petitioner was acquitted on counts charging him with aiding and abetting the importation of cocaine, in violation of 21 U.S.C. 952(a), and of possession of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1).

[4] Nocenti's fears for his personal safety presumably were connected with petitioner's unsavory reputation; this reputation was acknowledged by petitioner in a separate federal prosecution, in which he requested a change of venue on the ground that "the name Smaldone is so closely associated with crime and violence in the Colorado area that any possiblity of a fair trial was nonexistent." *United States* v. *Smaldone*, 485 F. 2d 1333, 1345 (C.A. 10).

v. *Illinois,* 390 U.S. 129. This Court in those cases went no further than to hold that a question concerning a witness' address is within the accused's constitutional right of cross-examination so long as the question does not tend merely to harass, annoy, or humiliate the witness. But when the question can reasonably be understood as implying a threat of personal injury to the witness, it is outside the bounds of constitutionally protected cross-examination. See *Smith* v. *Illinois, supra,* 390 U.S. at 133-134 (concurring opinion of Mr. Justice White); *United States* v. *Alston,* 460 F. 2d 48, 52 (C.A. 5); *United States* v. *Daddano,* 432 F. 2d 1119, 1128 (C.A. 7), certiorari denied, 402 U.S. 905; *United States* v. *Persico,* 425 F. 2d 1375, 1384 (C.A. 2), certiorari denied, 400 U.S. 869. The implied threat of retaliation against a witness is of course a serious form of harassment.[5]

Moreover, the values furthered by the Sixth Amendment would not have been advanced by requiring Nocenti to answer the question in the circumstances of this case. Nocenti was subjected to an extensive cross-examination (Tr. 290-368) covering his occupation, background, present circumstances, and activities and remuneration as a paid government informer. There was no further need

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[5] Petitioner alternatively contends (Pet. 17-20) that, even if the question impermissibly harassed Nocenti, the trial judge erred in prohibiting it without making an explicit finding of harassment. But restriction of the scope of cross-examination is within the sound discretion of the trial judge, and his rulings with respect to such matters may be overturned only upon a showing of an abuse of discretion. See, *e.g., Alford* v. *United States, supra.* In short, the trial court need not spell out the grounds for its findings with respect to the scope of cross-examination, and such rulings must be sustained if supported by any valid ground. See *United States* v. *Alston, supra.*

to place him "in the context of his environment." See *United States* v. *Saletko,* 452 F. 2d 193 (C.A. 7), certiorari denied, 405 U.S. 1040. Thus, petitioner has failed to show that, in the factual circumstances here, the exclusion of the question pertaining to Nocenti's address affected his "substantial rights." Rule 52(a), Fed. R. Crim. P.

2. With respect to petitioner's contention (Pet. 20-22) that he was entitled to production of the United States Attorney's interview notes made in preparation for trial, we rely primarily on the opinion of the court of appeals (Pet. App. 5a-9a). Petitioner claims that the decision below conflicts with *Saunders* v. *United States,* 316 F. 2d 346 (C.A. D.C.), which he characterizes as holding that such interview notes constitute "substantially verbatim recitals" subject to production under the Jencks Act. That was not the holding of *Saunders;* the court there only remanded for a hearing to determine whether such notes contained any producible material. That holding was implicitly disapproved in the subsequent decision in *United States* v. *Augenblick,* 393 U.S. 348, where on similar facts this Court did not remand but instead relied upon the "good sense and experience" (393 U.S. at 355) of the trial court. Thus there would appear to be no present conflict between the courts of appeals on this question.

3. Petitioner also contends (Pet. 22-24) that the trial court's instructions to the jury on the issue of specific intent improperly shifted the burden of proof away from the government. But, as the court of appeals noted, the trial court's repeated instructions with respect to the government's burden of proof were so clear, explicit, and emphatic that "[i]t is impossible to conceive [that the jury was] misled as to the neces-

sity for the government to prove specific intent beyond all reasonable doubt" (Pet. App. 16a). Moreover,contrary to petitioner's contention, there is no conflict among the courts of appeals as to the validity of the specific-intent instruction read to the jury in this case. In the cases petitioner cites (Pet. 23), the courts merely reviewed the jury instructions as a whole and determined that the specific-intent instruction also given here had not, in those prosecutions, been sufficiently clarified by accompanying instructions with respect to the burden of proof. Thus the differences in results among the courts of appeals reflect differences in the context in which the specific-intent instruction was given, not a disagreement about the validity *per se* of that instruction.

4. Petitioner further contends (Pet. 24-26) that the trial court erred in refusing to order pretrial disclosure under Rule 16(a)(2), Fed. R. Crim. P., of detailed laboratory findings and memoranda of chemical tests prepared by the chemists who identified the substance delivered to petitioner by Nocenti as cocaine. Discovery orders under Rule 16(a)(2) are within the discretion of the district court, and there was no abuse of discretion here. Petitioner had been supplied with summaries of the laboratory findings prior to trial (Pet. 13), the more detailed findings and memoranda were made available to him at trial (Tr. 435-439), the substance identified as cocaine was itself made available to the defense for its own analysis (Tr. 439), and defense counsel extensively cross-examined the chemist who had analyzed the substance for the government (Tr. 408-505). Petitioner therefore had ample opportunity at trial to contest the accuracy of the chemical findings.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1974.

DOJ-1974-01